



THE UNIVERSITY of EDINBURGH  
**EDINBURGH LAW SCHOOL**

# MacCormick Seminars

## **'SPEAK UP SCOTLAND!'**

Using law to voice regional concerns in a globalised world.  
Some thoughts from Australia.'

**Dr Louise Floyd**

Director of Research at James Cook Law School



**3 May 2011**

Neil MacCormick Room  
Old College  
13:00 to 15:00

Using labour law and the law pertaining to university employment and governance/publishing as her main examples, Dr Floyd argues that countries like Scotland and her native Australia can and must use law to voice local concerns and maintain their national character in a quickly globalising world.

**For further information please contact: [law.events@ed.ac.uk](mailto:law.events@ed.ac.uk)**

# **Speak Up Scotland!**

**Using Law to Voice Regional Concerns in a Globalised  
World.**

**(Some thoughts from Australia)**

**Dr Louise Willans Floyd**

MacCormick Fellow, University of Edinburgh Law School (2011);

&

Barrister, Supreme Court of Queensland;

Director of Research, James Cook Law School (Australia)



**Regionalism**

**in a**

**Globalised World**

# PART ONE: NATIONS WITHIN REGIONS



# **Nations within Regions: China and the West**

Largely completed before my arrival in Edinburgh:

Analyse Chinese legal developments (especially labour law)

Argue that the West has legitimate stake in arguing about Chinese Labour Standards

Propose legal steps to be taken.

# This research has been published in:

“When Old Meets New: Recent Developments in Chinese Law and their Relevance to the United States” (2011) *SMU Law Review* – Fall Edition

“Whistle-blowing and Compulsory Medical Examinations: Recent Developments in Australian Public Sector Employment Law and their Relevance to Hong Kong” (2011) *Hong Kong Law Journal*

“Reforming Public Sector Law after *Lam Siu Po* and *Rowse*: Some Useful Comparisons from Australian Law” (2009) 39 *Hong Kong Law Journal* 457.

# PART TWO: REGIONS WITHIN NATIONS



# SCOTLAND

This is my MacCormick Project

Hope to submit article mid-year in UK



# SCOTLAND

## THREE ISSUES:

—  
Has the UK Government sufficiently linked employment 'law' and procurement policy? In my view, *they haven't yet*. (Interestingly, the Queensland government certainly tries!)

In other words, the 'Big Society' seems like a nice idea, but there are a number of legal and financial issues No 10 needs to deal with (eg regarding procurement) if the government's stated purpose (ie to give small regional players the voice that they need) is to be achieved. (Important for policy not to be self-defeating).

# SCOTLAND

– Challenges for UK universities and funding issues. Aspects of the Australian model have been discussed by Universities Scotland, journalists so it is useful to consider:

- The Australian system: Our student fees system, which began in the Dawkins era. Thereafter, there was the era of gross underfunding and academics who had to empty their own garbage bins at work. Today we are post the Bradley Review: globally competitive universities *drive the economy* (The ‘smart state,’ the ‘clever country’);
- Universities are meant to pursue private funding opportunities and case law is developing in this context eg about academic intellectual property, university policies on research commercialisation eg *UWA v Gray* (Full Federal Court)
- Academic freedom issues (when does funding call quality into question; over-use/misuse of contract employment; mapping of disciplines to preserve national character);
- University discipline and stress issues – links to OHS law in the academic workplace.
- AUQA quality audit of 2011 (probably a good thing) and the excellent work of Professor Jim Jackson. The magic publication list – definitely a bad thing – and the ongoing submission of Dr LW Floyd to the Australian Research Council to change it. (Why don’t we place more importance on Asia?)

**& WHAT ALL THE ABOVE MEANS FOR SCOTTISH/UK UNIVERSITIES!** (‘the cuts’, the LSE funding ‘issue’ from February/March etc)

# SCOTLAND

– The Australian system is becoming increasingly centralised in the ‘southern states’ (Sydney, New South Wales; and Melbourne, Victoria) after state hand over of IR power and High Court decision *NSW and Ors v Cth*:

- As state unions and their money are absorbed into federal unions, what happens to unique state issues?
- Prime Minister Kevin Rudd, (who is Dr L Floyd’s delightful local MP) ‘cut down by the big boys of the south?’
- Importance of smart drafting and personality.
- Compare this is Scotland Bill and devolution/Scottish nationalism?
- This third issue is still a work in progress – to be completed in the next three months at home. So, I will be brief in dealing with this final issue in my lecture.

# SCOTLAND – basic premises of research

This photo is not Scotland – This is the end of my street in Townsville (Great Barrier Reef, Queensland) – *before* the Category Five Cyclone in February that uprooted 60 000 trees (including these ones).....

Does it have much in common with Sydney, Melbourne and Edinburgh?





# SCOTLAND – basic premises of research

The answer is – “less than you think” with Sydney and Melbourne; and “more than you think” with Edinburgh

- So, the position of Queensland within Australia is a bit like the position of Scotland in the UK (geographically north of the seat of power; special issues eg dengue fever/cyclones/flooding for us, the extreme cold and the fuel poor for you; Queensland kept Australia’s national economy afloat through our resource wealth – coal sales to China, you have been a test pilots for eg poll tax; tourism a key part of economy)
- **We need our own voice as well as a national voice.**
- How to do it?

# The late Professor MacCormick & the Love of Scotland – basic premises of research

Two of the many contributions were

The links between realisation of the individual and the connection to some collective framework. (The Cosmopolitan Scot); &

The idea of academic collegiality – that giving of yourself enhances your life as well as others.

There are links between these themes to the ideas of being a good Samaritan; of realising that ideas that may seem to jar may actually enhance each other; and the significance of mutual engagement.

*All these themes are relevant to the three issues I am discussing.*

[Thanks to Professor Zenon Bankowski for loaning me some papers by and about Professor MacCormick's work, one written by Zenon and another by Professor Neil Walker.]



# **The Role of the University – basic premises of research**

At Professor Himsworth's farewell it was said that the job of a University is to 'bite the hand that feeds'

I agree with the sentiment, but I would go further...

When universities sometimes 'bite that hand', they are simply doing their job...

'a place of light, liberty and learning...' and university constitutions and formative statutes

# ISSUE 1:

## The Big Society & Social Enterprises

Social Enterprises are supported by both the Coalition and Labour as providing valuable opportunities to the disadvantaged. My favourite social enterprise is NESS SOAP (website: [www.ness-soap.co.uk](http://www.ness-soap.co.uk))



# The Big Society & Social Enterprises

Social Enterprises are one of the flagships of The Big Society as described in the UK Government publication:

“BIG S ☺ CIETY, NOT BIG G ☺ VERNMENT”

NB: the publication actually does use smiley faces, not letter ‘o’s. My apologies because the face in “big government” should be frowning (not smiling), but my computer only had smiling faces...

[In case you are interested, any academic can find these computer symbols under the ‘miscellaneous dingbat’ section of their computer...]

# The Big Society & Social Enterprises

Building the Big Society is at the heart of the government's 'vision for change.'

No 10's public sector reform programme is designed to "cut costs while improving standards, and to enable social enterprises....to play a leading role in delivering public services and tackling deep-rooted social problems." [My emphasis].

One method is stated as being procurement.

# The Big Society & Social Enterprises

BUT don't forget 'The Cuts'

Question: What if the social enterprise bids for a tender but does not have a low price because of the social purpose it is also fulfilling?



# The Big Society & Social Enterprises

EU Treaty and Directive 2004/18/EC speak of “openness, transparency, non-discrimination.” Concepts are taken up in Britain by Public Contracts Regulations 2006.

At the moment, the No.10 guidelines state that price is not, in and of itself, determinative of a tender. Instead, look at cost and quality of product/bid.

The trick is, look at bid/goods first rather than emphasising social purpose – even though social purpose may provide jobs and fit “The Big Society.”

That said, the government says it is aware of this potential problem, so it has streamlined procedure for bids and also supports in principle Chris White’s Private Members Bill.

Some Labour support and some Conservative doubters, as well?



# The Big Society & Social Enterprises

Refer: Public Services (Social Enterprises and Social Value) Bill (debate 19 November 2010):

Chris White says that even Tony Blair spoke of big societies and that the idea is not new.

“It is easy merely to say what one believes, it is much more difficult to put forward concrete proposals that can help to realise those beliefs.”

The “elephant in the room is money.” Don’t do things “on the cheap.”  
“Supermarketisation of public services.”

NB: at a practical level “value” is still too closely linked to money. Potential benefits to communities are often ignored.

Discuss value (and the relevance of value to the community eg teaching skills to long term unemployed) at the committee stage, **which is yet to happen.**

# The Big Society & Social Enterprises

Scottish Government has some level of devolved power on this. EU Directive still relevant and also *Procurement Contracts (Scotland) Regulations 2006*

The matter is under review (cf Scot Gov website)

There are the 7 Cs: capability; competitiveness; capturing savings and benefits; coverage; collaboration; corporate social responsibility; and communications

CSR may be useful?

# The Big Society & Social Enterprises

ON A DIFFERENT YET SOMEWHAT RELATED TOPIC:

The Queensland government has consistently used procurement policy (eg) In tendering for construction, the state can require that bidder apply fair work practices.

Former federal government despised in some quarters for use of the grants powers to curb some workplace practices.

Positive discrimination? Although there are obvious problems with tendering (Emeritus Professor Nick Seddon on government contracting).

Compared to UK Parliament – whose view is it anyway?

# The Big society & Social Enterprises

In Qld, may be easier to research aspects of this?

Don't forget commercial in confidence, though.

# ISSUE 2: University Employment Law

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Challenges for UK universities, especially Scottish universities and the notion of 'the funding gap'.

Aspects of the Australian model have been discussed by (eg) Universities Scotland, UK documentaries and some UK politicians, so it is useful to consider the Australian system and some issues of academic employment law.



# University Employment Law

## THE AUSTRALIAN SYSTEM (evolution of):

After former PM Gough Whitlam (ALP) introduced free education in the 1970s, the system was reviewed by a separate, subsequent ALP government (Hawke-Keating) in the 1980s-1990s. Then Minister, John Dawkins, introduced reforms to stem the 'brain drain' of the time, which saw: amalgamations; some CAEs became universities; seeking of justification for courses and research (collection of statistics, pursue national priorities); and the introduction of the Higher Education Contribution Scheme (HECS) now known as Higher Education Loan Programme (HECS-HELP! For Commonwealth Supported Places - CSP).

Details see:

(Individuals section – read documents such as “Repaying your HELP Debt 2009-2010.”)

NOTE: paid when hit threshold; not interest but CPI; discounts if you pay upfront (20%); OS study loans available for a small part of your degree (OS HELP). University fees were increased under the former Howard Government and there was the introduction of the full fee paying student also if they missed out on a CSP (FEE HELP). Some caps on how much loaned, how long you can study. (Some extra fees for OS/FEE HELP)

HECS does not seem to create barrier to education – having said that...To be honest, I got my education for free...(residue of Whitlam in late-80s and dad paid the only Dawkins year I was charged for in early 90s...)

For more on the John Dawkins era see eg *Dawkins and the Labor Tradition: Instrumentalism and Centralism in federal ALP higher Education Policy 1942-1988 Australian Journal of Political Science Vol 25 Issue 1 1990 pages 6-20 (Stokes and Edmonds)*

**NB: The Australian government has a discretion to legislate for fee bonuses for those who work in fields important to the national interest eg nursing, maths and science. Also scholarships for Post Graduate Study.**



# University Employment Law

I mentioned that there was gross underfunding of the sector under the Howard (Coalition) Government eg some academics were expected to empty their own garbage at work!! In the early 2000s there was only about one Australian University in the top 100 Unis in the world. There are now at least five (which come from our version of the Russell Group, called the Group of Eight). Even smaller regionals like mine (which began life as the north Queensland outpost of a Group of Eight Uni prior to being made a uni in its own right) consistently make the top 5% of unis in the world and employ some of the most cited scientists in the world.

Recognising the problems this former ramshackle state of affairs could lead to, former PM Rudd (who ousted former PM Howard in 2007 only to be ousted himself in 2010) introduced the Education Revolution. Hence the stories about the 5.8% of GDP we spend on education.

Key Review was The Bradley Review, the basic premise of which is:

Globally competitive universities drive the economy (The 'smart state,' the 'clever country'). Money is definitely being spent on education, but there is a quid pro quo: universities are being closely monitored to ensure their standards are high. For newer and regional universities, there is acknowledgement that there needs to be time to entrench research culture. Further, there is emphasis on national social agendas (eg educating indigenous Australians) and also developing special mission universities (eg The Constitution says the university will have a particular emphasis on eg the tropics/the regions.)

# University Employment Law

Australian Universities are meant to pursue private funding opportunities and case law is developing in this context eg about academic intellectual property, university policies on research commercialisation eg *UWA v Gray* (Full Federal Court)

Intellectual property – Professor Monotti and also cases such as *University of Western Australia v Gray* [2010 – Full Federal Court – discussed in Cabrelli/Floyd article] Commercialisation of research

Bottom legal line is: academics have greater copy right to their teaching materials than unis usually think, but if they write a book obviously still expand and develop it, though. If you expect especially scientists to make money and invent, the uni usually only gets a slice of that money if this was spelt out in the employment contract (**invention is different from research**) – or if the university connection was used as a springboard. SO: universities have to be more savvy about employment contracts/policies and engage commercialisation professional services (eg look at licences).

Further, re management as ‘university employees’ think about the LSE saga from March 2011 in UK – **management needs to be trained by the employer if the employer is trying to recast academics as entrepreneurs (employers’ duty?)**. Just because you are a good scholar does not mean you are a good manager/business tycoon (and vice versa).

Is US system dis-analogous? For all the talk of Americanising the UK system, the American system is richer, with more of a culture of benefaction. In my view a dramatic shift to becoming Americanised now is not particularly helpful.

# University Employment Law

Academic freedom issues (when does funding call quality into question; over-use/misuse of contract employment; mapping of disciplines to preserve national character);

- One thing for Scotland to consider – you have EU background, but also think about mapping to preserve unique aspects of Scottish culture?



# University Employment Law

University discipline and stress issues – links to OHS law in the academic workplace.

The ‘bad old days’ in Australia caused stress problems in some academics and also a mini brain drain from academia.

Further, as students paid more for education, were they more likely to attack academics giving unfavourable outcomes to students?

Thoughts for Scotland from Australia’s ‘bad old days’ experience: OHS duty of employer to staff – encourage each other – it’s decent and it will assist in meeting OHS obligations! Also perhaps consider the Queensland employment law speciality (the orange blossom massage) as a means of workplace stress management (a happy workplace is a productive workplace); employer to facilitate development of mentoring skills in managers – use performance appraisal in a constructive way .

Managing student discipline issues and training in how to deal with students, see eg Professor Jim Jackson *Law for Educators* book (Lexis Nexis 2007) and my case note in *Australian Bar Review* (February 2010)

# University Employment Law

AUQA quality audit of 2011 (probably a good thing) and the excellent work of Professor Jim Jackson (latterly College Director, Kaplan Singapore). He is an expert on uni discipline, academic employment and academic freedom. (He is also my old PhD buddy from when we were both external students and I know his whole family and they are lovely)

Importantly, Australian law today predisposes itself against overuse of contract employment – although it still does happen. Importance of mentoring and developing newer staff.

The magic publication list – definitely a bad thing – the ongoing submission of Dr LW Floyd to the Australian Research Council to change it (why don't we place more importance on Asia?)



# University Employment Law

## RELATING THAT BACK TO SCOTLAND:

Why is the debate seeming to focus on fees? Where will the money come from out of the Scottish Block Grant if there are no fees?

Remember the basic proposition of the Bradley Review – there is a link between quality education and the economy. Edinburgh Uni is in top 50 world wide – it is important to the fabric of the UK economy. (Unis Scotland has been arguing this: *It's What We Do; Scotland's Creative Economy*)

Remember the points particularly relevant to the regionals (ie) do they have a specific mission for their community and particular speciality area? Further, what is their actual *economic* worth to building their community (is this the university town?) (ie) Edinburgh would be lost without you.

AUQA is being run by Professor Jim Jackson (who specialises in law of academic freedom as a part of academic employment). So, academic freedom and intellectual property is taken seriously for the individual academic as well as the institution.

## ISSUE 3: States' Rights in Employment Law (& Scotland's rights within the UK)

Once upon a time, there were state and federal industrial or labour law systems.

After *New South Wales and Others v Commonwealth* (High Court of Australia – November, 2006) and the state handovers of IR power - everything is going national.

This includes the finances of former state unions...(They are actually separate corporate entities.)

# **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

Remember the photo of where I live?



## **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

There are numerous issues that affect my state that do not affect others eg

Mechanic in Sydney cares about petrol costs for travelling to work. Mechanic in Queensland cares about dengue fever and heat exhaustion.

Other issues include: high casualisation of employment in tourist sector and also health and safety concerns in the mining sector



## **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

But the old state mechanisms are gone

My article in (2010) 33 *Australian Bar Review*:

“The *Fair Work Act's* forgotten issues: Why Richard Tracey's study of Trade Union Regulation and the Issues in the High Court's *McJannet* decision are worth a second thought”



# States' Rights in Australian Employment Law (& Scotland's Rights within the UK)

The sad demise of Prime Minister Kevin Rudd – my lovely local Member of Parliament.

Photo: K.Rudd at my church fete:



# States' Rights in Australian Employment Law (& Scotland's Rights within the UK)

Most people think K.Rudd looks a lot like a 50-something  
version of H.Potter...



# **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

“I’m now not the leader of the Labor Party but I’m the Prime Minister. Anything could happen folks...” Farewell speech – Full transcript available at [theaustralian.com.au](http://theaustralian.com.au) (24 June 2010)



## **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

The Night of Long Knives – how it took the faceless men (who were never elected by the Australian people) 14 hours to destroy a Prime Ministership

See for example Laurie Oakes (2010): *On the Record*

See also excellent New York Times Article at [http://topics.nytimes.com/top/reference/timestopics/people/r/kevin\\_rudd/index.html?scp=2&sq=australian%20federal%20election&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/r/kevin_rudd/index.html?scp=2&sq=australian%20federal%20election&st=cse)

## **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

Queensland is concerned about its position within the Commonwealth as co-operative federalism seems to lead to federally run initiatives.

See eg G Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31 NSWLJ 493.

B Calligan and J Wright, 'Australian Federalism' (2002) 32 Publius: The Journal of Federalism 147.



# **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

Our business opportunities kept Australia out of recession (eg 5 billion AUD in coal 25 March 2011; 120 billion AUD in LNG 17 December 2010)  
[www.cabinet.qld.gov.au](http://www.cabinet.qld.gov.au)

They took our business

They fired our boy as Prime Minister

They want our union money....

## **States' Rights in Australian Employment Law (& Scotland's Rights within the UK)**

This means there is significance on using  
Scottish Parliament

WIP – Scottish Nationalism; the Scotland Bill;  
etc....

Thank you for hosting me (especially David C and Neil W). My mother comes from a long line a clergy from Manchester and Wilmslow in Cheshire etc in Northern England (where some of our relatives still live). My late father was a 'boy made good' whose family came from Muirkirk, Scotland. He would have enjoyed my being here.

I hope one day to return to Scotland – it has been a great experience.

